In the

SUPREME COURT of the UNITED STATES

October Term, 1979

No. 79-1320

RAYMOND KASSEL, et al.,

Appellants,

vs.

CONSOLIDATED FREIGHTWAYS CORPORATION OF DELAWARE, A Delaware Corporation,

Appellee.

On Appeal from the United States Court of Appeals for the Eighth Circuit

MOTION TO AFFIRM

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QUESTIONS PRESENTED

The following questions are those presented by the argument in Appellants' Jurisdictional Statement:

1. In determining whether a state regulation of vehicle size promotes safety, is the trial court's consideration limited to those aspects of safety denominated by the state, without inquiry as to their significance or as to other countervaling safety characteristics?

2. Was it error for the District Court to make findings of fact?

STATEMENT OF THE CASE

The 65-foot twin trailer is a standard vehicle for interstate transportation of general commodity freight.[1] Twins offer distinct operating advantages including more rapid and flexible service, reduction of cross-dock handling, reduced exposure of freight to damage or loss, improved fuel efficiency, and improved service to smaller towns.

General commodity carriers, such as Appellee, offer service throughout the country and serve many communities by interchanging equipment with other carriers. Thirty-four states permit the operation of 65-foot twin trailers. With the exception of Iowa, those states prohibiting 65-foot twins are located in the East or Southeast. Iowa is the only state with a 60-foot length limitation for twin trailers. The odd-sized trailer of the 60-foot twin cannot be interchanged.

As a result of Iowa's ban, East-West traffic that would normally cross Iowa via Interstate 80 is diverted through northern Missouri on U.S. 36, a predominantly two-lane highway. The ban forces North-South traffic to either be diverted or move in semis through Iowa. Traffic originating or terminating in Iowa, other than in border cities,[2] must be placed in semis or shuttled in single twin trailer-tractor combinations.

The ban results in delays, increased exposure of cargo to

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[1] As in the District Court's opinion, reference to twins or twin trailers will be to 65-foot twin trailers. Sixty-foot twin trailers will be so identified.

[2] Iowa permits the operation of 65-foot twin trailers in cities which border other states, thereby providing twin trailer service for shipments originating from or destined to many of Iowa's industrial areas. The actual exemption is for the city's "commercial zone", an area substantially larger than the city proper.

damage, and increased costs of operation. The unnecessary vehicle miles caused by the ban ". . . result in more accidents, more injuries, more fatalities and more fuel consumption, than would occur if the 65-foot twins were operated through Iowa over I-80 and I-35". Order of the Court Denying Stay Pending Appeal, August 20, 1979.

Iowa's Interstate Highways do not present a special case where limitation of traffic is necessary due to congestion or deterioration. The evidence at trial showed that the addition of 65-foot twins on the Interstate System in Iowa would have no discernable effect on the system's generally high level of service. Twin trailers cause substantially less road wear than semis because of advantageous axle spacing.

Extensive evidence showed the 65-foot twin trailer to be as safe or safer than the 60-foot twin trailer or 55-foot semi. Appellants virtually conceded the absence of any evidence that twin trailers are less safe vehicles than semis. Appellants' experts had no opinion as to their overall safety.

Appellants instead based their defense on three main arguments. First, they contended that the evidence on overall twin trailer safety was inconclusive. Second, they offered evidence on isolated safety characteristics as to which they argued twins to be deficient. They contended that if in any aspect a twin was less safe, the regulation must be upheld. Finally, Iowa asserted that even if twins' overall safety were as good as that of semis, Iowa could ban them to reduce traffic volume.

The District Court rejected each of Appellants' three contentions, specifically holding the evidence of 65-foot twin trailer safety to be conclusive. The Court evaluated all safety characteristics in reaching its conclusion. Iowa's diversion argument was rejected as a local purpose of little weight in

the balancing process, since the diversion merely shifted interstate traffic to other states and magnified the number of accidents, injuries and fatalities associated with the traffic.

The Court of Appeals affirmed the District Court in each respect. It agreed that the proper test was the overall safety of the vehicle and found the trial court's conclusions on twin trailer safety to be well supported in the record. The argument that Iowa could properly divert traffic to other states to reduce its own accidents was also rejected by the Court of Appeals. The Court declared that a state could prohibit a vehicle which was unsafe, even if it were permitted by other states. However, the Court noted, where a state regulation promoted safety locally, not by prohibiting an unsafe vehicle but by diverting interstate traffic to other states, the regulation was entitled to little weight. The Court also pointed to Iowa's numerous size and weight exemptions as undercutting the state's safety claim, even though not directly discriminatory.

ARGUMENT

NO SUBSTANTIAL FEDERAL QUESTION IS PRESENTED.

A. Recent, Clear Precedent applies.

The test applied by this Court in commerce clause cases is that enunciated in *Pike v. Bruce Church:*

> "Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. *Huron Cement Co. v. Detroit*, 362 U.S. 440, 443. If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on

interstate activities." *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

This Court recently applied the *Pike v. Bruce Church* test to a state vehicle length regulation in *Raymond v. Rice*, 434 U.S. 429 (1978). The facts of *Raymond* are almost identical to those of this case.

In *Raymond*, Plaintiffs challenged a Wisconsin regulation which prohibited operation of 65-foot twin trailers. The regulation was shown to burden interstate commerce by forcing diversions of traffic around Wisconsin, the shuttling of twins into the state, and the use of 55-foot semis for through traffic where twins would normally be used. Substantial evidence was introduced that twins were as safe or safer than semis. Wisconsin defended on the basis that the regulation bore a rational relation to safety, because, it argued, length is related to safety and it takes longer to pass a twin trailer.

This Court held the regulation to be invalid. It applied the *Pike v. Bruce Church* test, noting that the ban of twins burdened interstate commerce and, on the facts before it, did not promote safety. The Court specifically noted that Wisconsin's reliance on the rational relation test was misplaced. Substantial evidence existed that twin trailers were safe, and the uncontroverted evidence was that factors such as increased passing time were insignificant in the context of Interstate Highways. In addition, Wisconsin had permitted extensive exemptions to its general length limit for the benefit of local interests.

Though *Raymond* applied *Pike v. Bruce Church*, it also enunciated two corollaries to be applied when the local purpose asserted is the promotion of safety. Both corollaries reflect the importance of human life and a concern that

safety not be impaired in a balancing of state and national interests.

The first corollary is that where a regulation purports to promote safety, the courts will accord a strong presumption that the regulation in fact does so. To rebut that presumption, plaintiff must do more than merely produce a preponderance of the evidence. Plaintiff must produce sufficient evidence to provide the court with a "firm basis of decision," an assurance that not only is plaintiff's evidence stronger than the defendant's, but that plaintiff's evidence properly reflects reality. The point is particularly made in *Raymond* because of Wisconsin's erroneous reliance on the rational relation test and consequent neglect of the facts.

The second corollary is that if the court determines that the regulation actually promotes safety, the balancing test is pre-empted. The courts will not balance the gain in safety against the economic burden created by the regulation. Unlike the factual determination of whether safety is promoted, the determination of how much safety at what cost is a policy decision for elected representatives, not the courts.[3]

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[3]The two corollaries provide the distinction between *Brotherhood of Locomotive Firemen & Enginemen v. Chicago, Rock Island & Pacific Rrailroad.* 393 U.S. 129 (1968) and *Raymond v. Rice*, 434 U.S. 429 (1978); *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520 (1959); and *Southern Pacific Co. v. Arizona*, 325 U.S. 761 (1945). In *Brotherhood*, the railroads failed to meet either corollary. They did not produce a case sufficiently certain to rebut the presumption. Moreover, the District Court specifically found that the requirement of an extra train crew member increased safety in certain situations, but considered this increase in safety to be too small to justify the added costs caused by requiring the extra crew member in all situations.

In *Southern Pacific*, *Bibb*, and *Raymond*, the plaintiffs were able to produce substantial and convincing evidence that the regulation did not promote overall safety, even though it was claimed to do so in certain respects, such as slack coupling accidents, splash and spray, or passing time. Absent overall promotion of safety, the States could not justify the burden imposed by their regulations.

The District Court and Court of Appeals followed the recent precedent of *Raymond*. To demonstrate grounds for reversal in this case, Appellants must show that (1) the facts *as determined by the lower court*[4] distinguish this case from *Raymond*, or (2) the issues presented are different from *Raymond* and were wrongly decided, or (3) the facts of this case show *Raymond* to be bad policy.

The First two grounds, although raised by Appellants, are not a basis for review by this Court. Absent some showing of national importance, they do not pose a substantial federal question. Only the last ground, that *Raymond* is bad policy, posits a reason for reversal and a reason for review by this Court. Appellants, however, raise this last claim by bald assertion which rests on hyperbole and does not survive examination.

B. The Lower Courts Properly Decided The Only New Issue Presented.

At trial and on appeal, Iowa officials argued that they may force twin trailers to divert around the state so as to achieve local benefits from the reduction in traffice volume. The issue was not presented in *Raymond*. The argu-

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[4] Appellants confuse distinguishing the adjudicated facts of this case with a license to re-argue the evidence. This Court will not normally grant plenary review for the purpose of reviewing evidence, particularly where the factual findings of the District Court are concurred in the Court of Appeals. *United States v. Johnston*, 268 U.S. 220, 227 (1925); *Graver Tank* & Mfg. Co. v. Linde *Air Prod. Co.*, 336 U.S. 271, 275 (1949); *Berenyi v. Immigration Service*, 385 U.S. 630, 635 (1967). The rule has particular application here. The Circuit Court of Appeals stated the District Court's finding of twin trailer safety to be "based on a record replete with substantiating evidence." 612 F.2d 1064, 1069.

ment is alluded in the Jurisdictional Statement, though not forcefully presented.[5]

It is important to understand clearly Iowa's argument. The argument does not contend that twin trailers are less safe, or cause more road wear or congestion, than other vehicles. Iowa is asserting that it may, if it so chooses, reduce traffic volume by closing the borders of the state to a portion of interstate through traffic.

The diversion reduces the harmful side effects of traffic in Iowa but increases the total accidents, road wear and congestion associated with the traffic. It is a parasitic relationship. Iowa achieves advantages only to the extent to which other states, and interstate commerce itself, are disadvantaged. Though not facially discriminatory, the argument has, as the District Court noted, "the aura of protectionism usually associated with discrimination against interstate commerce." 475 F.Supp. 544, 551.

Iowa's decision to reduce traffic volume by limiting the movement of interstate commerce of little benefit to Iowa harms not only the national economy by burdening interstate commerce, but also the political union. It engenders the same rivalries and animosities among the states that the Commerce Clause was designed to limit. If Iowa may limit interstate commerce of little benefit to Iowa, another state may limit interstate commerce of little benefit to it. Here, Iowa reduces its traffic volume by diverting twin trailers which are principally moving manufactured arti-

[5]It is ironic that Appellants only faintly present the argument here. At trial, the testimony of state officials made it clear that the reduction of traffic by diversion was Iowa's principal motivation in banning twins, c.f. Governor's Veto Message, Ex. 53.

cles to the West from the industrial East and Midwest. An industrial state might well choose to reduce its traffic volume by banning grain trucks of little local benefit.

If each state may achieve benefits by limiting that part of interstate traffic of little benefit to it, the end result would be a hodge-podge of restraints that would pit one state against the other, and eliminate the freedom of transportation vital to the national economy. This Court has rejected such isolationist approaches to common problems. *Philadelphia v. New Jersey*, 437 U.S. 617 (1978); *Edwards v. California*, 314 U.S. 160 (1941).

C. THE REMAINING ISSUES AND FACTS PARALLEL THOSE OF *RAYMOND*.

1. *The Evidence of Twin Trailer Safety Is Conclusive.*

Under *Raymond*, Plaintiff has the duty of presenting a sufficiently comprehensive case to rebut the presumption of validity accorded the state law in question. If plaintiff's evidence is insufficient to provide a firm and assured basis of decision, the trial court should uphold the state regulation. This Court found the evidence in *Raymond* sufficient to provide a firm basis for decision. The evidence in this case duplicated and went beyond that in *Raymond*.

Appellants claimed at trial that the evidence of twin trailer safety was inconclusive. In their Jurisdictional Statement, Appellants imply that twins are a relatively

new and untried vehicle.[6] They further assert that the lack of reliable information left Appellants and intervenor, Motor Club of Iowa, Unable to produce any substantive evidence that twin trailers are unsafe.

The record, however, shows extensive, and in many cases, uncontroverted evidence of twin trailer safety. The record includes:

1. A comprehensive study of 65-foot twin trailers conducted by the Iowa Department of Transportation in 1975, which contained:
   a. A survey of transportation officials in all states then permitting twin trailers;
   b. A review of the engineering aspects of twin trailers vis-a-vis semi trailers;
   c. An in-depth analysis of Missouri's accident records for twin trailers and semis;
   d. A study of comparative accident records of major carriers;

[6]Sixty-five foot twin trailers are not "new" vehicles. For instance, the ICC in changing its regulations in 1961 to permit carriage of explosives in twins, reviewed extensive data of twin operations occurring between 1954 and 1960. Sixty-five foot twins have been permitted in Iowa under the border city exemption since 1959. A BMCS study reviewed over *two billion* miles of twin trailer operations between 1969 and 1976. The American Association of State Highway and Transportation Officials formally proposed that all states permit their use in 1964. The 65-foot length was recognized as the standard for interchange in 1967 by the Truck Trailer Manufacturers Association and in 1968 by the Society of Automotive Engineers.

e. Analysis of maneuverability, splash and spray, passing, and aerodynamic disturbance characteristics of twin trailers; and
f. An overall review of every issue relating to twin trailers that could be identified.

2. A 1965 report of a Governor's commission in the State of Virginia which included:
   a. Maneuverability and braking tests comparing semi trailer and twin trailer performance under varying conditions;
   b. Actual field observations by State Patrol officers of twin trailer operations in other states;
   c. Experimental operations in Virginia under state supervision by one motor carrier;
   d. Driver reaction surveys; and
   e. A review of accident statistics then available.

3. Deposition testimony of state highway officials, including the testimony of the chiefs of highway patrols, safety directors, and other officials from the States of Illinois, Minnesota, South Dakota, Kansas, Montana, Nebraska, and California.

4. Deposition testimony from Kenneth Pierson, Deputy Director of the Bureau of Motor Carrier Safety, U.S. Department of Transportation, and deposition testimony of Ernest Cox, the former Deputy Director.

5. Over ten statistical reviews or studies of twin trailer safety which ranged from simple reviews of state accident records, such as one conducted by Kansas, to very carefully documented, controlled variable, Matched Pair Analysis which compared twin trailer and semi trailer operations over identical routes with equal drivers under similar weather and traffic conditions.

6. A multi-tiered highway safety analysis of twin trailer safety, including detailed examination of accident statistics, accident causes, potential sources of bias, and a review of the available information on twin trailer safety.

7. The testimony of insurance officials as to loss experience and risk estimates for twin trailers.

8. Published engineering studies, tests, and related testimony, including:
   a. Field tests comparing twin trailers in passing maneuvers;
   b. Braking tests comparing twin trailers and semi trailers, and the compliance of both vehicles with federal braking standards;
   c. Computer simulations comparing the stability of twin trailers to that of other vehicles, and actual field tests to verify the computer simulation performed by the Illinois Institute of Technology Research Institute;
   d. Actual field tests of splash and spray done by various groups including vehicle type comparisons done

under contract to the United States Department of Transportation;

e. Field tests of the jackknifing potential of twin trailers done on solid ice by the Winter Driving Hazards Committee of the National Safety Council;
f. A detailed component by component examination of commercial vehicle air brakes comparing twin trailers and semi trailers;
g. Professional papers published by the SAE developing mathematical formulae for predicting dynamic vehicle behavior; and
h. A film showing the behavior of twin trailers during emergency maneuvers at speed.

9. A segment by segment level of service analysis of Interstate 80 in Iowa and the diversion route through northern Missouri.

Appellants' argument of inconclusiveness is specious. The evidence duplicated and went well beyond that of *Raymond.* Moreover, the affirmative evidence weathered exhaustive cross-examination and minute analysis by Appellants.[7] The District Court was unimpressed with Appellants' arguments and specifically addressed the conclusiveness of the evidence:

> "Defendants claim that the evidence is inconclusive on the relative safety issue, and it is a reasonable policy decision for Iowa to make a safety distinction between twins and semis. Defend-

[7]In their Jurisdictional Statement, Appellants make passing references to a number of items, suggesting that a substantial rebuttal case was presented. The Appendix to this Motion contains a detailed examination of those items.

> ants argue that they should prevail because of the strong presumption. The Court cannot accept this argument as it believes that the evidence clearly establishes that the twin is as safe as the semi." 475 F. Supp. 544, 549.

The Court of Appeals in upholding the District Court's finding of twin trailer safety noted that it was based on a record "replete with substantiating evidence." 612 F. 2d 1064, 1069.

2. *The Trial Court Properly Determined the Overall Safety of Twin Trailers*

The strength and conclusiveness of the facts adduced at trial left Appellants arguing, as Wisconsin did in *Raymond*, that the District Court should not consider the facts. Appellants assert that the trial court should have taken judicial notice of "the relationship between safety and truck size" as a "general proposition of social fact." It should then have noted that the state made a "colorable showing" of a deficiency in some safety related aspect, and terminated its review.[8] Under this analysis, it would be irrelevant that the evidence shows 65-foot twins to be safe. Equally, it would be irrelevant that Appellants' "colorable showing" is illusory, and that the evidence shows the claimed safety defi-

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[8]Appellants posit that they need only present a "colorable showing" on the basis of the following sentence in *Raymond*:

> "The State of Wisconsin has failed to make even a colorable showing that its regulations contribute to highway safety." 434 U.S. 429, 448.

Logicians will recognize the fallacy of the converse. That Wisconsin could not even make a colorable showing does not imply that a colorable showing is all that is needed.

ciencies to be devoid of significance and outweighed by positive safety aspects of the vehicle. In short, the facts would be irrelevant.

As a general proposition, Appellee will concede that length may relate to safety, but the connection is not simple, and limiting length does not necessarily promote safety. A longer vehicle may be more stable, more maneuverable, and present less accident exposure than a shorter vehicle. Other factors such as the articulation of the vehicle, its wheel base and axle configuration, weight, relation of width to length, and cargo capacity, all affect safety. A shorter vehicle is not, *per se*, a safer vehicle.

Appellants' reliance on judicial notice on this subject in the presence of facts to the contrary is misplaced and was specifically rejected in *Raymond:*

> "The District Court, without mentioning this evidence, suggested that language in *Morris v. Duby*, 274 U.S. 135, 144 (1927), and *Buck v. Kuykendall*, 267 U.S. 307, 315 (1925), established a principle 'that for purposes of judicial review of state highway legislation, size restrictions might be deemed inherently tied to public safety . . .' 417 F. Supp., at 1360. The language relied upon does not go so far, and it antedates the era of the limited-access, four-lane divided highways involved in this case. Size restrictions, like other highway safety regulations, are entitled to a strong presumption of validity, but this presumption cannot justify a court in closing its eyes to uncontroverted evidence of record." 434 U.S. 429, f.n. 19.

Nor can Appellants make the presumption of safety irrebuttable by making a "colorable showing" of safety when

the evidence shows that colorable showing to be illusory.[9] With some expansion, Appellants' "factual" evidence that twins are unsafe parallels Wisconsin's in *Raymond*. Wisconsin pointed to the greater length of time to pass a twin. Appellants here point to the greater passing time, greater time to cross an intersection, and greater hazard at an accident scene. As in *Raymond*, the evidence shows these claims to be illusory and devoid of practical significance.[10]

As this Court has reiterated, the trial court must determine the "total effect" of the law as a safety measure. Illusory safety claims will not justify the statute, *Southern Pacific Co. v. Arizona*, 325 U.S. 761 (1945); *Bibb v. Navajo Lines, Inc.*, 359 U.S. 520 (1959); *Raymond v. Rice*, 434 U.S. 429 (1978).

To hold otherwise on these facts would be to undercut *Raymond's* primary concern that safety not be sacrificed in the balancing of competing national and state policies. The facts show twin trailers to be safe. If the ban of twins is to be upheld on the basis of disproved presumptions and illusory safety claims, actual highway safety will be sacrificed.

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[9]The Appendix to this Motion contains a discussion of these points in the context of the evidence.

[10]The lack of practical significance is implied by Iowa's numerous exemptions which present a striking parallel to those in *Raymond v. Rice*, 434 U.S. 429 (1978). Wisconsin permitted the movement of newly manufactured twin trailers out of the state, as does Iowa. Wisconsin permitted overlength vehicles to transport automobiles, as does Iowa. Wisconsin permitted twin trailer milk haulers; Iowa permits overwidth loads of hay and overlength hog carriers. Wisconsin permitted overlength operations between plants in Wisconsin and between plants and the border. Iowa permits overlength operations, including 65-foot twin trailers, to and from its border cities. The total number of overlength movements in Iowa is unknown, however, as most of its exceptions are statutory and, unlike Wisconsin, require no permit.

3. *The Burden on Interstate Commerce is Substantial.*

Iowa's ban imposes a burden on interstate commerce quite similar to that in *Raymond v. Rice, supra.* Appellee's ". . . operations are disrupted, their costs are raised, and their service is slowed by the challenged regulation." 434 U.S. 429, 438. The quantifiable, direct economic cost to Appellee is also similar: two million dollars annually. In addition, the evidence in this case shows that the ban increases accidents.

Appellants contend that the diversion and these costs are the result of "a recent voluntary business decision" of Appellee.[11] The decision is not recent, but it is a voluntary choice designed to minimize the economic and safety costs of Iowa's ban. Appellee's only other options are to use semi trailers over its entire transcontinental mainline relay, shuttle twins through Iowa, or transfer and retransfer cargo between twins and semis at Iowa's borders. Each of these options would substantially increase the vehicle miles traveled, thereby increasing costs and exposure to accidents.[12]

Appellants additionally suggest that the burden is insignificant because it constitutes a small percentage of Appellee's total revenues. The appropriate comparison is not to Appellee's operations in 48 states, but to the cost of transporting goods through Iowa absent the ban, c.f. *Ray v. Atlantic Richfield*, 435 U.S. 151 (1978).[13]

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[11]Appellants claim this to be a factual finding of the District Court, Jurisdictional Statement, p. 8. It is not.

[12]Because of a semi's lessened volume, 10% to 16% more vehicle movements would be necessary to move an equivalent amount of general commodity freight.

[13]The Iowa DOT found that the cost to all carriers of its ban exceeded $12,000,000 annually, as of 1974.

Appellants' final suggestion is that Appellee made no showing that the savings would result in lower rates for shippers, Jurisdictional Statement, p. 18. The suggestion is true in only the most limited sense. The testimony was that most of the savings would pass through to shippers under ICC regulation. However, given the very rapid recent increases in diesel fuel costs, these savings would probably result in a lowering of increases, rather than an actual lowering of rates.

D. The Policy Of *Raymond* Is Soundly Applied In This Case.

The result reached by application of *Raymond* in this case is reasonable. Appellants have virtually conceded that their ban on twins does not actually promote safety. Their own study found 65-foot twins to be safe vehicles. That study also showed that the ban imposed a significant burden on interstate commerce, and caused a total increase in the number of accidents associated with the traffic. Iowa obviously wishes to continue to divert traffic. Yet, their nominal reference to the diversion argument without discussion implies that they know their position to be constitutionally unsound.

The *Raymond* policy, they contend, spells an end to any state regulation of vehicle size. If such were the case, the policy would be bad. The facts of this case and the logic of *Raymond*, however, do not suggest the end of state regulation. Here, the vehicle banned is safe. If it were not, *Raymond* would uphold the statute. Indeed, were the evidence on safety less certain, *Raymond* would uphold the statute. If the vehicle banned were not a standard vehicle widely used, the burden on interstate commerce would not be significant,

and *Raymond* would uphold the statute. If Iowa had significant local benefits achieved by the statute, other than those achieved at the expense of her neighbors, *Raymond* would uphold the statute.

Appellants' assertion that *Raymond* will not permit reasonable regulation of vehicle size, rests on the hyperbole of counsel, not the holdings of *Raymond* or the holding of this case. Here, Iowa's regulation must bow, for it is unreasonable. It burdens interstate commerce and does not accomplish its goal of promoting safety.

CONCLUSION

Appellants' vigorous advocacy at trial and on appeal failed to distinguish the substance of this case from that of *Raymond v. Rice*, 434 U.S. 429 (1978). The District Court and Court of Appeals properly followed that recent precedent in holding that Iowa's ban of 65-foot twin trailers violated the Commerce Clause.

The decision in this case is consistent with the policy factors underlying both the Commerce Clause and this Court's application of the Clause to state regulation of interstate commerce.

For the foregoing reasons, Appellee respectfully requests that this Honorable Court grant this Motion to Summarily Affirm the court below.

Respectfully submitted,

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March 28, 1980

APPENDIX

In their Jurisdictional Statement, Appellants make passing references to items of evidence supposedly supporting their contentions, thus implying that Iowa presented a substantial factual case. Iowa did argue its case vigorously, but did so in the absence of facts to support the arguments. Though Appellants have not directly contended that the District Court's factual findings are erroneous, their disregard of these factual findings requires some discussion of the facts they assert.

"COLORABLE SHOWING"

Appellants contended that they introduced evidence of increased passing time, additional intersection congestion, and greater hazards at the scene of the accident, amounting to a "colorable showing" that twin trailers are unsafe. The facts show the claims to be illusory.

Passing. At a 10 m.p.h. speed differential, a twin trailer takes one-third of a second longer to pass than a 60-foot twin or livestock carrier, two-thirds of a second longer than a 55-foot semi. The difference is inconsequential, particularly since in actual practice, passing vehicles tend to accelerate until they pass the other vehicle, reducing the time differential. Numerous witnesses testified that the passing time difference was devoid of significance. They included Col. James Crawford, Minnesota Highway Patrol; Thomas Doyle, former Director-State Engineer, Nebraska Highway Department; Prof. Archibald Easton; Col. Dennis Eisnach, Superintendent, South Dakota Highway Patrol; Dr. Arland Hicks, Safety Director, Kansas Highway Department; Joel Leisch, Transportation Analyst; Major James Adkins, Kansas State Highway Patrol; Claud McCamment, former Safety Director, Kansas Highway Department; Fred Meyers, highway engineer; John Nimmo, Iowa Transportation De-

partment engineer; Kenneth Pierson, Deputy Director, Bureau of Motor Carrier Safety, United States Department of Transportation; Thurman Sherard, Chief Engineer, Western Highway Institute. The 1975 Iowa DOT Study concluded:

> "The data shows that a slight increase in length has no significant impact on the passing distance."

Moreover, in bad weather, a twin is easier to pass, as it produces 20% less splash and spray than a semi, a fact determined by tests, and noted in actual experience by many of the witnesses.

Intersection Congestion. There are no intersections on Interstate Highways, the only intersections at issue in this case are those involved in stops for food, fuel, or access to terminals. The same fraction of a second difference noted in passing would apply to a twin trailer crossing an intersection. If the intersection involved a sharp turn or other maneuver, the twin trailer would cause less problem because of improved maneuverability. Iowa's claim of concern for intersection conflicts is traduced by the border city exemption which allows unrestricted operation of 65-foot twin trailers on city streets.

Hazard at Accident Scenes. The record is devoid of support for the contention that a 65-foot twin trailer presents greater hazard at an accident scene. Col. Edward Dickinson, Chief of the Iowa Highway Patrol, speculated that a twin trailer would present a hazard if it could not be backed to clear an accident. He did not know if the vehicles could be backed.

* * *

"Q. When I listened to your testimony, with the exception of backing — correct me if I am wrong, because I don't want to mischaracterize your testimony — but all of the problems that you addressed in regard to your testimony were problems that you associated with large trucks, generally?

A. [Col. Dickinson] Yes, that's true.

Q. With the exception of backing, you are in no way — you were in no way suggesting that this problem is greater with 65-foot twins than with a 60-foot twin, or another semi?

A. No, that's right.

Q. Do you have an opinion as to whether the 65-foot twin is safer or less safer than a 55-foot semi?

A. I really don't. I'm not that all familiar with the exception of that one characteristic.

Q. Do you know how far a 65-foot twin trailer can be backed?

A. No, with the exception of information that has been given to me about those.

Q. Who gave you that information?

A. I don't recall. It was in an earlier — it might have been back in the earlier trial. As I recall, it came up during that time, but that's the only one question I have about their real safety, other than any operational problems.

Q. You don't know how far, if at all, they can be backed?

A. No. I would imagine it might depend upon — somewhat upon the operator, but I can't positively feel that they could be successfully backed for any distance without losing their control.

Q. If the units can be backed up sufficiently, would you regard that as reducing or negating your concern?

A. Yes, if it could be demonstrated to me that this could be successfully done, I certainly would feel differently about that problem." Tr. pp. 1188-1190.

The record shows that twins can be backed sufficiently to clear an accident scene, c.f. Ex. 71, Virginia Twin Trailer Study, which reports the tested backing ability of 65-foot twin trailers.

These three items constitute Appellants' "colorable showing" that twin trailers are unsafe.

REBUTTAL EVIDENCE

In their Jurisdictional Statement, Appellants contended that Iowa introduced evidence tending to rebut plaintiff's case for the safety of twin trailers. They mention jackknives and upsets in snow and ice, the "overall" accident rate for CF doubles in 1975, 1976, and 1977, some drivers' opinions, and refutation of CF's statistics and the BMCS study.

Jackknives and Upsets in Snow and Ice. CF operates twin trailers in those states where they are legal; it operates only semis in the East and Southeast.[14] Not surprisingly, CF has more twin accidents in snow and ice, and more semi accidents in rain because of this geographical difference. Appellants' own expert noted the geographical difference and that the accidents in snow and ice are the result of exposure differences:

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[14]The semi operations in the Southeast affect national operations. The southern transcontinental route from the Southeast across Texas, New Mexico and Arizona has considerable semi traffic. The northern route through Wisconsin, Minnesota, the Dakotas, Montana, and Idaho, and the central route through Iowa are almost entirely (80%) twin traffic.

"Q. Looking at accidents overall, did you make any observation in regard to exposure?

A. [Dr. Koehler] I think my observations would be the same as those presented in Mr. Glennon's exhibit; that doubles had a higher rate of accidents in snowy and icy conditions, but that was not surprising to me after I was told that the doubles don't operate in the southeast. A large number of CF tractor semis operate there.

Q. In other words, some of these differences in accident type are quite probably caused by differences in exposure rather than differences in the vehicle configuration?

A. That's true.

Q. And the converse of that, it would be erroneous to claim that the higher number of jackknives for twins or the higher number of rear-end accidents for semis is the result of the vehicle configuration rather than being the result of exposure for — or differences in exposure?

A. Yes, just from the data we have available."
Tr. 1752-1753.

Appellants' counsel has no compunction about now asserting the conclusion which Appellants' own expert said would be erroneous.[15]

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[15]Jackknifing tests on glare ice by the Winter Driving Hazards Committee of the National Safety Council found no significant difference in jackknifing on slippery surfaces for semis and twins. The Chairman of that Committee, Prof. Archibald Easton, testified that twins would start to jackknife slightly more readily, but could be better controlled and would recover more easily. He reiterated in testimony the overall conclusion, based on years of testing, of his 1972 paper, "Jackknifing of Articulated Vehicles on Slippery Surfaces":

". . . The safety of the 55-foot tractor semi trailer and the 65-foot twin trailer combinations is not significantly different." Easton deposition, Ex. 7, p. 3.

1975, 1976 and 1977 Accident Rates. The reference to a higher overall accident rate for twins in 1975, 1976, and 1977 is false.

Most truck accidents are minor and involve damage to the trailing equipment. The trailing equipment of a semi costs $10,600; the trailing equipment of a twin, $17,400. Twins also carry more cargo. As a result, an accident of the same magnitude will generally cause more dollar damage to a twin than semi. Both Appellee's expert, Dr. Glennon, and Appellants' expert, Dr. Koehler, agreed that use of a minimum dollar cut-off for biased the statistics against twins.[16]

Appellants' only support for their contention of higher "overall" accident rates are rates using a $250 dollar minimum cut-off for reporting. Even those rates show no year in which the twin rate is statistically significantly above that of semis,[17] but numerous years when the reverse is true. Over the entire eight-year period, the higher semi accident and injury rates are statistically significant, a fact found by both experts.

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[16]The bias is not small. Based solely on CF equipment damage, a $250 cut-off would have reported only 38% of all semi accidents, but 53% of all twin accidents in 1978. The variation is truly the result of the difference in equipment cost and not differences in accident severity. Semis had a higher percentage of injury or fatality producing accidents, despite the lower dollar damage.

[17]"Statistically significant" refers to a determination of whether an observed difference reflects an actual difference or merely random variations. The determination varies with the size of the sample and of the difference. Experts on both sides agreed on the importance of determining whether differences were statistically significant, and jointly used the formula for statistical significance developed by Appellants' expert.

Drivers' Opinions. Some CF drivers prefer semis, some prefer twins. As one driver put it, having a preference between twins and semis, is: ". . . just personal. Some people like redheads, and some people like blondes." Gianforte deposition, p. 22.

The trial court properly concluded: "Although some drivers preferred the handling characteristics of semis over twins, none felt that twins were unsafe." 475 F. Supp. 544, 549.

Statistics. Appellants state that their expert "refuted the validity" of various statistical studies offered by CF. The statement in one sense is true. Appellee presented to the trial court every statistical study it knew to exist. Appellee's expert, Dr. Glennon, then pointed out the failings of numerous studies and the reasons why they could not be relied upon. Appellants' expert, Dr. Koehler, concurred. After extensive analysis of CF's data for possible sources of bias, Dr. Glennon concluded that the CF data was without bias favoring twins. Dr. Koehler concurred, at least for 1978. The experts disagreed, however, on the Bureau of Motor Carrier Safety study. Dr. Koehler speculated there might be bias, though he knew of none nor which vehicle might be favored. Dr. Glennon tested the study for bias, and concluded that there was none.

Dr. Koehler's supposition that there might be bias hardly constituted refutation of the study. The trial court noted in its opinion that there were many studies that had biases. The trial court did not find the BMCS study to have bias. It relied most heavily on CF's data, admitted by both experts to be free of bias favoring twins, and on the Matched Pair study, whose methodology was approved by both experts.[18]

[18]The Matched Pair study was used to eliminate any uncontrolled variables that might affect the comparison. The study involved extracting trips in which both twins and semis traveled at approximately the same time, over the same roads, and with equivalent drivers. Over 188,000 trips covering 112,000,000 miles of comparable travel resulted. The accident rates for the two vehicles on these trips were then compared. There was no statistically significant difference in the accident rates of the two vehicles, though Dr. Koehler noted that the study provided "moderately strong" evidence that semis had more injury producing accidents because the difference in injury rates was almost significant.